IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9785 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DIVISIONAL RAILWAY MANAGER

Versus

SECRETARY

Appearance:

MR JAYANT PATEL, with Mr.Mukesh Patel,

for the petitioners.

MR TR MISHRA for the Respondent.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 18/09/2001

ORAL JUDGEMENT

1. Rule returnable today. Mr.Mishra waives service of rule on behalf of the respondent. With the consent of the parties, the matter is heard finally today.

The present Special Civil Application has been filed by the Railway Administration, challenging the Award passed by the Industrial Tribunal (Central), Ahmedabad in Miscellaneous Application (ITC) No.8 of 1999.

2. The facts leading to the present controversy are

as under :-

The respondent Union had raised an industrial dispute, which was referred to the Industrial Tribunal (Central), Ahmedabad and was numbered as Reference (ITC) No.14 of 1997. The aforesaid dispute was raised by the Union for certain demands. At this stage, we are not

..2/-

concerned with the merits of the said Reference. The aforesaid Reference was dismissed for default since on behalf of the respondent-Union, nobody remained present on the relevant day before the Tribunal. The original order, by which the said reference was dismissed for default, is produced at page 39. In the said order, it has been mentioned by the Court that, on the date of hearing, nobody remained present nor Statement of Claim was produced. It is stated in the order that no reasons are given for such absence. In that view of the matter, it was presumed that the Union was not interested in the said order and in view of their absence, the said Reference was dismissed. The aforesaid order was passed on 7.10.1998. Thereafter, on behalf of the respondent-Union, application was made to the Tribunal for setting aside the aforesaid order, by which the Reference was dismissed for default. The said application was numbered as Miscellaneous Application (ITC) No.8 of 1999. The Tribunal came to the conclusion that there was sufficient reason and explanation given on behalf of the present respondent, who was the applicant of that application before the Tribunal. Initially, reference was made by the Union of India and by mistake, it was referred to the Industrial Tribunal, Khanpur. Subsequently, the same was transferred to the Ahmedabad Tribunal, but after the matter was transferred to the Ahmedabad Tribunal, no notices were sent to the union, informing them that the matter is transferred to the Industrial Tribunal, Ahmedabad. The aforesaid aspect is discussed by the Tribunal in paragraph 6 of the impugned order. The Tribunal found that there is nothing to show that the Union has received any intimation about the pendency of the matter at Ahmedabad Tribunal. The Tribunal, therefore, came to the conclusion that there was sufficient reason for setting aside the order dismissing the Reference for default. The Tribunal came to the conclusion that in view of the decision of the Supreme Court in Grindlays Bank Ltd. v. The Central Government Industrial Tribunal and others, AIR 1981 SC 606, even if such an application is made after 30 days after the publication of the Award, still, the Tribunal has jurisdiction to decide the same and the Tribunal can pass appropriate orders. The Tribunal, having found that

there was sufficient reason for setting aside the order of dismissal, set aside the order dismissing the Reference for default and, accordingly, original Reference (ITC) No.14 of 1997 was restored and it was ordered that the said Reference should be decided on merits. The aforesaid decision of the Tribunal is impugned in the present petition at the instance of the Railway Administration.

3. At the time of hearing of this petition, Mr.Jayant Patel, learned Advocate appearing for the petitioner, argued that the original Reference was dismissed for default on 7th October, 1998. The said decision was published in the Gazette on 9.11.1998 and that 30 days' period from the date of publication of the said Award was over on 9.12.1998 and, thereafter, the application for restoration was made on 25.10.1999. According to Mr.Patel, therefore, the Tribunal had no jurisdiction to set aside that ex parte Award since such application was filed by the respondent-Union after a period of 30 days from the date of publication of such Award. Mr.Patel, therefore, submitted that the Industrial Tribunal had no power to restore the said Reference since the Award was already published since long and it cannot be said that the Tribunal was possessing any power to restore the matter as the Tribunal has become functus officio moment period of 30 days expired from the date of publication of the Award.

4. Mr. Patel has also further submitted that, even otherwise, the Tribunal has no power to restore the matter on file as no such powers are available with the Tribunal. It was also argued by Mr.Patel that, in any case, the matter cannot be said to have been dismissed for default by the Tribunal, but it was as such dismissed on merits.

5. Against the aforesaid argument, Mr.Mishra, learned Advocate, in his turn, argued that so far as the order dismissing the Reference for default is concerned, the said order cannot be equated with an `Award', and that by dismissing the Reference for default, the Court is not adjudicating the rights of the parties and, therefore, it should be treated as a `Nil' Award and, as such, cannot be treated as an Award at all, and in such cases, the Court can, at any point of time, set aside the order dismissing the Reference for default. Mr.Mishra has also relied upon certain decisions of the Supreme Court to substantiate his case that even if there is an ex parte Award, the same can be restored on file at any time and the Courts have wide powers to set aside such

Award in order to do substantial justice between the parties. He also further submitted that the Tribunal has powers to set aside ex parte Awards or even to restore the Reference which is dismissed for default.

6. So far as the first contention of Mr.Patel about non-availability of the powers with the Tribunal is concerned, it is required to be noted that in absence of the respondent-Union or any of his representatives, the Tribunal, without adjudicating the matter on merits, rejected the Reference because of the absence of the representative of the respondent-Union. The original order, by which the reference was dismissed, is produced at page 39, Annexure `E'. From the reading of the said order, it is clear that the Tribunal has not decided the said reference on merits and the Reference was dismissed only because of the absence of the Second Party, i.e., the respondent herein. It cannot, therefore, be said that the Tribunal has given any decision on merits of the case at all. The Tribunal, therefore, has not adjudicated the rights of the parties and it can never be said that there was any adjudication at all by the Tribunal on the merits of the Reference.

7. At this juncture, definition of Award given in the Industrial Disputes Act is required to be considered. Section 2(b) provides as under :-

> " ... ...
>
> 2. Definitions.-In this Act, unless there is anything repugnant in the subject or context,-
>
> xxx xxx xxx
>
> (b) "award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under Section 10-A;"
>
> ... ..."

Looking to the definition, therefore, it cannot be said that by passing the impugned order, by which the Reference was dismissed for default, the Tribunal has determined rights of the parties in any manner. By dismissing the matter of a party for default, the Court

is not adjudicating the rights of the parties and not deciding the matter in issue on its merits. Virtually, therefore, no rights are decided by such an order. So far as publication of Award is concerned, Section 17 of the Act deals with the said aspect. Section 17 reads as under :-

> " ... ...
>
> 17. Publication of reports and awards.-(1) Every report of a Board or court together with any minute of dissent recorded therewith, every arbitration award and every award of a Labour Court, Tribunal or National Tribunal shall, within a period of thirty days from the date of its receipt by the appropriate Government, be published in such manner as the appropriate Government thinks fit.
>
> (2) Subject to the provisions of Section 17-A, the award published under sub-section (1) shall be final and shall not be called in question by any Court in any manner whatsoever.

It is also required to extract Section 17-A, which runs as under :-

> " ... ...
>
> 17-A. Commencement of the award.-(1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under Section 17 :
>
> Provided that-
>
> (a) if the appropriate Government is of opinion, in any case, where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party; or
>
> (b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal,

that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days.

(2) Where any declaration has been made in relation to an award under the proviso to sub-section (1), the appropriate Government or the Central Government may, within ninety days from the date of publication of the award under Section 17, make an order rejecting or modifying the award, and shall, on the first available opportunity, lay the award together with a copy of the order before the Legislature of the State, if the order has been made by a State Government or before Parliament, if the order has been made by the Central Government.

(3) Where any award as rejected or modified by an order made under sub-section (2) is laid before the Legislature of a State or before Parliament, such award shall become enforceable on the expiry of fifteen days from the date on which it is so laid; and where no order under sub-section (2) is made in pursuance of a declaration under the proviso to sub-section (1), the award shall become enforceable on the expiry of the period of ninety days referred to in sub-section (2).

(4) Subject to the provisions of sub-section (1) and sub-section (3) regarding the enforceability of an award, the award shall come into operation with effect from such date as may be specified therein, but where no date is so specified, it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3), as the case may be.

... ..."

Relying upon the aforeaid provisions, it was argued by Mr.Patel that the moment the Award was published in the gazette, it has achieved finality and in view of Section 17(2), the same cannot be called in question by any Court in any manner whatsoever. However, in my view, considering the fact that the Tribunal had dismissed the matter for default, in view of the fact that nobody had remained present on behalf of the other party, the Tribunal had not disposed of the said matter on merits, and hence, rights of the parties were not adjudicated at all by the Court. Therefore, even if such decision was published, such publication, at the most can be said to be publication of the decision of the Court and it cannot be said that it was "publication of the Award", which would disentitle the applicant to apply to the Court for setting aside the dismissal order. If the Court has adjudicated the rights of the parties, such adjudication stands on a different footing, but, in the instant case, since there is no adjudication at all, it cannot be said that there is any enforceable Award passed by the Court and, in that view of the matter, it cannot be said that the Court had become functus officio or that it had no powers to entertain the application for setting aside the dismissal order simply on the ground that the decision taken by the Court was published. Looking to the original order, it cannot be said that the Tribunal has taken any decision on merits and, therefore, it is not possible to accept the submission of Mr.Patel that the Court has not retained its powers to decide the application for restoration moment Award was published within the stipulated period. Provisions of Section 17(2), therefore, cannot be said to be applicable to the facts of the present case, as, in the instant case, it can never be said that any enforceable Award was passed by the Labour Court while dismissing the complaint of the Opposite Party for default.

8. In Special Civil Application No.271 of 1997, (Prathamsinh K. Patel v. Chairman/Vachhavad Dudh Utpadak Sahakari Mandli Ltd.), decided on 6.11.1998, this Court dealt with a case, wherein an almost similar type of situation arose. The petitioner therein contended that even if the workman raising the industrial dispute does not file the statement of claim, the Labour Court or the Industrial Tribunal is under an obligation to adjudicate the reference and the reference cannot be rejected merely on the ground that the workman has not filed the statement of claim. In support of the said contention, the learned counsel for the petitioner in that case relied on the decisions in Workmen of

Travancore Rayons Limited v. Manager, Travancore Rayons Limited & Anr., 1968 Lab. I.C. 139 and Management of Pandavapura Sahakara Sakkare Karkhane Limited v. State of Mysore & Ors., 1969 Lab. I.C. 729. This Court (Coram : N.N. Mathur, J.) held as under :-

> " ... ...
>
> 5. The definition clearly stipulates determination of the Industrial dispute or any question relating thereto referred to the Labour Court or the Industrial Tribunal. There can be no determination of a dispute much less the industrial dispute unless there is an adjudication on merit. The determination may be interim or final but mere dismissal of a reference for non prosecution by no stretch of imagination can be said to be determination of a dispute. It is of course true that when a matter is withdrawn, there remains no dispute which requires any adjudication and the Labour Court and the Tribunal may permit withdrawal. That would be entirely a different situation. Thus, in any view, a reference made under Section 10 of the Industrial Disputes Act cannot be rejected for want of prosecution. I am fortified in my view by the two decisions referred by the learned advocate for the petitioner.
>
> ... ..."

Accordingly, the said Special Civil Application was allowed and the order of the Labour Court rejecting the Reference therein was quashed and set aside and the Reference therein was restored to the file of the Labour Court.

In view of what is stated above, therefore, I am of the opinion that when the Industrial Tribunal dismissed the Reference for want of prosecution as the respondent did not remain present, the Tribunal had ample power to restore the matter on file on sufficient grounds, and, as stated above, it cannot be said that there was any Award passed by the Industrial Tribunal while dismissing the matter for default. It is also required to be noted that deciding the matter ex parte stands on a different footing than dismissing the matter for non-prosecution. If, for example, one party is not present and in his absence, the Court decides the matter

on merits, the decision can be said to be an ex parte decision. Nonetheless, it can be said to be a decision on merits. Further, if the applicant is present and in absence of the other side, his case is allowed, the other side will have remedy to apply for setting aside ex parte Award. In the instant case, however, there is no adjudication on merits at all and merely the reference is dismissed for non-prosecution. Such order, therefore, cannot be equated with an order like deciding the case ex parte. In the latter case, application for setting aside Award might be required to be made within stipulated period. However, in the instant case, as stated above, since there is no Award worth the name, the aforesaid restrictions cannot be said to be applicable and the Tribunal was competent, therefore, to set aside the aforesaid Reference which was dismissed for default.

9. Mr.Patel, however, relied upon the decision of the Delhi High Court in the case of Anil Sood & Ors. v. S.K. Sarvaria & Ors., 1997 I L.L.J. 1066. In the aforesaid case, a Division Bench of the Delhi High Court, while interpreting Section 17-A of the Industrial Disputes Act, was concerned with the enforceability of the Award on expiry of 30 days from the date of publication of the Award. It has been found by the Delhi High Court that after expiry of 30 days from the date of publication of the Award, the Industrial Tribunal/Labour Court becomes functus officio and has no jurisdiction to entertain an application. In the said case, application for setting aside was filed beyond the said period of 30 days and in those circumstances, it was found that such application was not maintainable. However, it is required to be noted that the very decision on which Mr.Patel has made reliance, was carried further before the Apex Court and the said decision of the Apex Court is reported in Anil Sood v. Presiding Officer, Labour Court II, 2001(2) LLN 611. The Supreme Court, after considering the case of the Apex Court in Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others, 1978(2) L.L.N. 110, has come to the conclusion as under :-

> " ... ...
>
> 6. The aspect that the party against whom award is to be made due opportunity to defend has to be given is a matter of procedure and not that of power in the sense in which the language is adopted in S. 11. When matters are referred to the Tribunal or Court they have to be decided

objectively and the Tribunals / Courts have to exercise the discretion in a judicial manner without arbitrariness by following the general principles of law and rules of natural justice.

7. The power to proceed ex parte is available under rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficient cause for the absence of a party at the hearing, and if there is sufficient cause shown which prevented a party from appearing, then if the party is visited with an award without a notice which is a nullity and, therefore, the Tribunal will have no jurisdiction to proceed and consequently, it may necessarily have power to set aside the ex parte award.

8. If this be position in law both the High Court and the Tribunal fell into an error by stating that the Labour Court had become functus officio after making the award though ex parte. We set aside the order made and the award passed by the Labour Court and affirmed by the High Court in this regard. In view of the fact that the learned counsel for the respondent conceded that the application filed by the appellant be allowed, we set aside the ex parte award and restore the reference. To decide the matter afresh, the parties shall appear before the Labour Court on 11 December 2000 to take further directions as regards proceedings. As the matter is very old, it would be appropriate for the Labour Court to dispose of this reference as expeditiously as possible but not later than six months from today.

... ..."

The Apex Court, after considering the earlier judgment of the Supreme Court, in Grindlays Bank (supra), set aside the Division Bench judgment of the Delhi High Court, on which reference was made by Mr.Patel. The present case stands on a better footing, as, in the instant case, the reference was dismissed for default.

10. So far as the contention of Mr.Patel that the no

powers are available with the Court to set aside ex parte decision is concerned, in my view, if the matter is dismissed for default, the Court has all the powers to restore the same and such powers are always inherent with the Court. In any case, in view of the aforesaid ruling of the Supreme Court in the case of Anil Sood (supra), there is no substance in the said argument of Mr.Patel that the Court has no power to set aside the ex parte Award.

11. Mr.Patel has also relied upon the decision of the Madras High Court in Arokiadass (P) v. Government of Tamil Nadu, Madras & others, 1995-III LLJ 34, which is on the same line of the Delhi High Court decision in Anil Sood (supra). I, therefore, do not find any substance in any of the arguments of Mr.Patel, viz., that since 30 days have passed after the Award was published, the Court could not have set aside the earlier order or that the Industrial Tribunal had no power to decide the application for setting aside the ex parte decision.

12. So far as the last contention of Mr.Patel, that the decision by which the Industrial Tribunal dismissed the Reference was a decision on merits, is concerned, it has absolutely no basis worth the name. The order itself is clear to the effect that the Court has said that since the other side is not present, it is presumed that they are not interested in the matter and the matter is dismissed in view of their absence. The said decision, therefore, can never be said to be a decision on merits at all and the decision is taken only in the absence of the other side. It is also required to be noted that the Court has clearly found that there was no intimation given to the other side about the aforesaid matter which was transferred to Ahmedabad Court as observed by the Tribunal in its impugned order and, therefore, the Tribunal found that there was sufficient ground for setting aside the aforesaid decision by which the reference was dismissed for default. It, therefore, cannot be said that the Tribunal has committed any error of law or of jurisdiction in restoring the matter on file.

13. The next contention of Mr.Mishra is also required to be considered at this stage. Mr.Mishra submits that, in any case, the Industrial Court could not have dismissed the Reference for default and once the Reference is made, the same was required to be adjudicated on merits. In his submission, therefore, once the matter is referred by the appropriate Government to the Court for adjudication, the Court has to give

finding on merits. He submitted that, may be, if the evidence is not sufficient, the Court can certainly reject the Reference on the ground that there is no sufficient evidence produced by the workman and, therefore, no relief can be granted, but, according to him, reference is required to be decided on merits, either accepting or rejecting it, but the Tribunal or the Labour Court, as the case may be, could not have refused to adjudicate the matter simply because the party is not present before the Court.

14. At this juncture, reference is required to be made to the decision of the Karnataka High Court in N.M. Naik v. P.O. Labour Court, Hubli, 1997 (77) F.L.R. 914, wherein the Karnataka High Court held as under :-

> " ... ...
>
> In my opinion, the rejection of reference for default of the workman cannot be called an `award' within the meaning of Section 2(b) of the Act. This is the view taken in other decisions also, to be presently referred to.
>
> Section 2(b) inter alia defines award as meaning an interim or a final determination of any industrial dispute or any question relating thereto by any Labour Court. Such determination of an industrial dispute or question relating thereto is undertaken by the Labour Court on reference being made under Section 10 of the Act, or by an application under Section 10(4A) of the Act, where the said section is applicable. In both the events, what is pre-requisite is that there was a dispute that needed to be adjudicated upon. Where a dispute is felt so important as to necessarily need an adjudication by the concerned forum, and not a frivolous one in respect of which reference could be refused by the appropriate Government, it is expected that such a dispute has to be determined on merits. The Labour Court/Industrial Tribunal, therefore, cannot treat such reference as just a dispute between two individuals in a civil proceeding so that it could be dismissed for default of the workman who would be in the position of plaintiff in a suit. The

essence of the entire scheme of reference of the dispute for adjudication to a Labour Court/Industrial Tribunal under the Act being one of determination of the dispute on merits, just because the Labour Court/Industrial Tribunal disposes of the reference for the absence of the workman, such an order cannot be called an `award' within the meaning of Section 2(b) of the Act, since, as required under the said Section 2(b), there would be no determination of any industrial dispute at all but would merely be a disposal of reference. The inevitable conclusion to be reached, therefore, is that, though, in view of Rule 22 of the Rules as earlier referred to, even where the workman remains absent, the Labour Court/Tribunal can proceed to deal with reference, such dealing with the reference shall have to be for the purpose of determination of reference on merits so that the order that it eventually passes could be termed an `award' within the meaning of Section 2(b) of the Act. The Labour Court/Industrial Tribunal cannot and shall not dispose of the proceedings for default of either of the parties. Where such rejection of reference is made without consideration of merits and without adjudicating upon the dispute referred, in my opinion, such an order cannot be called an `award' within the meaning of Section 2(b) of the Act. If it is not an `award' within the meaning of Section 2(b), then merely because it is published under Section 17, it does not become an award enforceable under Section 17-A and binding on the parties under Section 18(3). The order in the earlier reference dated 17.3.1987, therefore, was not an `award' within the meaning of Section 2(b) of the Act. The application under Section 10(4A) of the Act having been filed by the petitioner workman in exercise of the right given to him by the Amendment Act referred to above within the time prescribed therein, petitioner workman had a right to have the dispute concerned adjudicated upon. The Labour Court, therefore, acted arbitrarily in disposing of the said application as not

maintainable.

... ..."

15. Reference is required to be made to the Division Bench judgment of the Madhya Pradesh High Court in Sital v. Central Government Industrial Tribunal-cum-Labour Court, Jabalpur, and others, 1969-II LLJ 275. It has been observed by the Division Bench of the Madhya Pradesh High Court as under :-

" ... ...

The main question for consideration is whether the tribunal could, as it did in this case, accept an amicable settlement between the parties which "did not specify the manner in which the disputes have been settled" and make an award in terms of that settlement because "there now remains nothing for adjudication" by the tribunal sofar as these five specific demands are concerned. We are clearly of opinion that the tribunal could not act in that way without disregarding the provisions of the Act. The word `award' as defined in Cl.(b) of S.2 of the Act means

"an interim or final determination of any industrial dispute or of any question relating thereto by any labour court, industrial tribunal or a national industrial tribunal and includes an arbitration award made under S. 10A."

We think that the word "determination" used in the definition implies adjudication upon relevant material by the labour court or the tribunal. So, it has been held that once a reference has been made under S.10(1) of the Act, it cannot be rescinded or cancelled : State of Bihar v. Ganguli (D.N.) and others (1958-II L.L.J.634). It cannot also be dismissed for default because that would amount to putting an end to the proceedings otherwise than by adjudicating upon the dispute :

... ..."

16. I am of the opinion, therefore, that once the dispute is referred to the Competent Court by the appropriate Government, the Court has to adjudicate upon the same. However, if the parties do not assist the Court by leading evidence and by remaining present, then, naturally, the Court can pass appropriate order either by rejecting the reference on the ground that no sufficient material is placed on record, by which the Court can accept the demand of the workman. Under these circumstances, it will be a decision on the merits of the case, which cannot be treated at par with dismissing the reference for non-prosecution. Therefore, considering the scheme of the Act, it seems that such powers are not available to the Court, and the Court has to adjudicate the Reference on the basis of the reference made to it by the appropriate Government and once the reference is made, it has to be answered on its own merits, instead of dismissing the same for non-prosecution. It is always open, therefore, for the appropriate Court to pass appropriate order, as stated earlier, if no sufficient evidence is placed by the party prosecuting his case. Even in that view of the matter, the original reference could not have been dismissed for default by the Court. In any case, subsequently, having found that there was sufficient ground for restoring the matter on record, ultimately, the Court restored the same. Under these circumstances, therefore, it cannot be said that the Tribunal has committed any error of law or of jurisdiction while restoring the aforesaid reference on file. As stated earlier, deciding the Reference ex parte in absence of other side stands on an entirely different footing than to dismiss the reference for default. There are powers available with the Tribunal under Rule 22 to decide the matter ex parte in absence of other side, but, nonetheless, it will be an adjudication of the dispute on merits. Such is not the case when the Reference is dismissed for non-prosecution and, therefore, though the Tribunal or the Court is competent to decide ex parte such Reference, it has no power to dismiss it for default as it would amount to not deciding the reference at all in any manner.

17. On all the aforesaid grounds, I do not find any substance in this petition. The petition is dismissed.

Since the Reference is of 1997, I direct the Tribunal to dispose of the same as early as possible, preferably by 31st December, 2001 so that the Reference may be put to an end before the end of this year.

At this stage, Mr.Patel for the petitioner requested that the present order may be stayed for some time as he wants to file an appeal. In the facts of the case, the present order of this Court is stayed for a period of three weeks from today.

Rule is discharged with no order as to costs.

(P.B. Majmudar, J.)

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(apj)